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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-624

PAUL L. POWELL,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

BRIEF IN OPPOSITION TO PETITIONER'S APPLICATION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Double Jeopardy Clause of the United States Constitution permit a state supreme court to review the judgment of a state appellate court, which reversed the trial court's conviction of the defendant for insufficiency of evidence, where review by the state supreme court will not result in a retrial of the defendant.

ARGUMENT

THE ORDER OF THE SUPREME COURT OF ILLINOIS REVERSING THE ORDER OF THE APPELLATE COURT WHICH REVERSED PETITIONER'S CONVICTION OF BRIBERY AND SOLICITATION DOES NOT RUN AFOUL OF THE DOUBLE JEOPARDY CLAUSE OF THE UNITED STATES CONSTITUTION BECAUSE IT WILL NOT RESULT IN A SECOND TRIAL OF PETITIONER.

This Court has observed that the Double Jeopardy Clause provides three related protections:

> It protects against a second prosecution for the same offense after an acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense. *North Carolina* v. *Pierce*, 395 U.S. 711, 23 L. Ed. 2d 656 (1969).

Where there is no threat of either multiple punishment or successive prosecutions, the Double Jeopardy Clause is not offended. In various situations where appellate review would not subject the defendant to a second trial, this Court has held that an order favoring the defendant could be constitutionally appealed by the Government. Thus, the Government has been permitted to appeal from orders arresting judgment after a verdict has been entered against the defendant. See: *United States* v. *Bramblett*, 348 U.S. 503, 99 L. Ed. 594 (1955); *United States* v. *Green*, 350 U.S. 415, 100 L. Ed. 494 (1956). Since a reversal on appeal would merely reinstate the jury's verdict, review of such an order does not offend the policy against multiple prosecutions.

Similarly, it is well settled that an appellate court's order reversing a conviction is subject to further review

where the appellate court has ordered the indictment dismissed and the defendant discharged. *Forman* v. *United States,* 361 U.S. 416, 4 L. Ed. 2d 412 (1960). As this Court pointed out in *United States* v. *Wilson,* 420 U.S. 332, 43 L. Ed. 2d 232 (1975),

> * * * Although review of any ruling of law discharging a defendant obviously enhances the likelihood of conviction and subjects him to continuing expense and anxiety, a *defendant has no legitimate claim to benefit from an error of law when that error could be corrected without subjecting him to a second trial before a second trier of fact.* (emphasis supplied). *Id.* 43 L. Ed. 2d at 242-43.

It is submitted that the controlling constitutional principle underlying the Double Jeopardy Clause is the prohibition against multiple trials. Therefore, where a Government appeal presents no threat of successive prosecutions, the Double Jeopardy Clause is not offended. *United States* v. *Martin Linen Supply Co.,* 430 U.S. 564, 51 L. Ed. 2d 642, 650 (1977).

The present case involves a situation where the State of Illinois' appeal to the Illinois Supreme Court will not result in a retrial of the petitioner. The petitioner, an attorney, was convicted of bribery and solicitation by the trial court in a bench trial. On petitioner's appeal from both convictions, the appellate court reversed the trial court on the ground that the evidence was insufficient to support either conviction. (Petition for writ of certiorari, App. A. p. 1). On its review of the appellate court's judgment, the Illinois Supreme Court concluded that the trial judge "found the evidence sufficient, and we find nothing in this record justifying a contrary conclusion." The court then reversed the appellate court's judgment and affirmed the trial court's judgment convicting petitioner of bribery and solicitation. (Petition of writ of certiorari, App. A, p. 1)

As can be readily seen from this brief analysis, the Illinois Supreme Court simply reviewed the judgment of the appellate court, and determined, as a matter of law, that there was sufficient evidence to convict petitioner of bribery and solicitation, and the appellate court's judgment to the contrary was erroneous. The Illinois Supreme Court's judgment did not result in a retrial of petitioner; it did result in a reinstatement of the trial court's judgment of conviction. Under the above cited decisions of this Court, no double jeopardy will result from such a review of an appellate court decision by a State's highest tribunal.

The petitioner bases his double jeopardy argument almost exclusively upon two recent decisions of this court, *Burks* v. *United States,* —— U.S. ——, 57 L. Ed. 2d 1 (1978), and *Greene* v. *Massey,* —— U.S. ——, 57 L. Ed. 2d 15 (1978). Neither of these decisions is applicable to the case at bar. In *Burks,* this Court held "that the Double Jeopardy Clause *precludes a second trial* once the reviewing court has found the evidence legally insufficient." (Emphasis supplied) (57 L. Ed. 2d at 14). In *Greene* this Court granted certiorari "to decide whether a state may *retry* a defendant after conviction has been reversed by an appellate court on the ground that the evidence introduced at the prior trial was insufficient . . ." (Emphasis supplied) (57 L. Ed. 2d at 18). Both cases stand for the proposition that the State may not retry a defendant without violating the Double Jeopardy Clause after a reviewing court has determined that the defendant's conviction must be reversed because the evidence produced at the first trial was legally insufficient to convict. Neither case—contrary to petitioner's assertion—stands for the proposition that a determination by a state appellate court that the evidence is legally insufficient to support a conviction, may not be reviewed by that state's supreme court without violating double jeopardy.

As a matter of fact this Court recognized in *United States* v. *Wilson*, 420 U.S. 332, 43 L. Ed. 2d 232 (1975) and *United States* v. *Jenkins*, 420 U.S. 358, 43 L. Ed. 2d 250 (1975) that the constitutional protection of double jeopardy against Government appeals attaches only where there is a danger of subjecting the defendant to a second trial for the same offense. In *Wilson* this Court noted that,

> When a case has been tried to a jury, the Double Jeopardy Clause does not prohibit an appeal by the Government providing that a retrial would not be required in the event the Government is successful in its appeal.
>
> When this principle is applied to the situation where the jury returns a verdict of guilt but the trial court thereafter enters a judgment of acquittal, an appeal is permitted. In that situation a conclusion by an appellate court that the judgment of acquittal was improper does not require a criminal defendant to submit to a second trial; the error can be corrected on remand by the entry of a judgement on the verdict. To be sure, the defendant would prefer that the Government not be permitted to appeal or that the judgment of conviction not be entered, but this interest of the defendant is not one that the Double Jeopardy Clause was designed to protect.* (43 L. Ed. 2d at 256-57)

Because the government's appeal to the Illinois Supreme Court did not result in a retrial of the petitioner and the error in the appellate court's judgment can be corrected upon remand to the trial court by reinstatement of the conviction, double jeopardy will not occur.

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* This Court also observed that the principle is the same whether the case was originally tried to a jury or a judge in a bench trial.

CONCLUSION

The above cited decisions establish beyond doubt that the Illinois Supreme Court in the instant case could properly review the appellate court's judgment without violating the Double Jeopardy Clause as long as that review will not result in a retrial of the peitioner. Since the Illinois Supreme Court's review of this case did not result in such a retrial, no federal constitutional right of petitioner's has been violated and it is respectfully requested that a writ of *certiorari* be denied.

Respectfully submitted,

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